FILED OFFICE OF ADMINISTRATIVE HEARINGS 04/23/2019 10:53 AM

STATE OF NORTH CAROLINA

IN THE OFFICE OF ADMINISTRATIVE HEARINGS 18 EDC 03019

COL	NTY	OF:	MFCKI	FNRI	IRG

together with his parent Petitioner,	
v. Charlotte-Mecklenburg Schools Board of Education Respondent.	FINAL DECISION

THIS MATTER CAME on to be heard before Administrative Law Judge Selina Malherbe on September 24, November 20 and 26-30, December 12-14, 2018, and January 4, 2019.

APPEARANCES

For the Petitioner:

Ann Paradis and Corey Frost¹ Gahagan Paradis, PLLC 3326 Durham-Chapel Hill Boulevard, Suite 210-C Durham, NC 27707

For the Respondent:

Jill Sanchez-Myers and J. Melissa Woods Charlotte-Mecklenburg Board of Education 600 East Fourth Street, 5th Floor Charlotte, NC 28202

WITNESSES

For Petitioner:	<u>r:</u>	
Petitioner	Student	
Petitioner	Mother of	
	former Charlotte-Mecklenburg Schools (hereafter "CM	S") Teacher and
s former	Private Math Tutor	
	Head of School, (herea	after "
	Director of Academic Standards, s Teacher,	
Dr.	Expert Witness, Behavior Analyst, Professor of Special 1	Education
Dr.	Expert Witness, Neuropsychologist	

also appeared in this case for Petitioner but withdrew prior to the conclusion of the proceedings.

For Respondent:

s former English Teacher, CMS
s former Earth Science Teacher, CMS
Expert Witness, School Psychology Specialist, CMS
Exceptional Children's Itinerant Coordinating Teacher, CMS
Stacie Levi, Director of Administrative Services, Exceptional Children's Department, CMS

PREHEARING MOTIONS

Various motions were made prior to and during the hearing and rulings were made on the record. Of particular note for this written decision: Respondent's Motion for Partial Summary Judgment was granted concerning all claims arising prior to May 17, 2017, raised in Petitioner's Second, Fourth and Seventh Counts.

EXHIBITS

The following Exhibits were admitted into evidence:

Stipulated Exhibits ("Stip. Ex.") 1 through 4, 6-7, 9, 12-14, 17, 19-20, 36 (for limited purpose: historical background), 37 (for limited purpose: historical background), 38 (pp. 215, 217-232), 39 (for limited purpose: historical background), 43, 45-47, 49-50, 51 (for limited purpose: it was discussed at 5/19/17 meeting), 52 (pp. 312-318), 54-56, 66, 70, 73, 77 (pp. 485-486), 80, 87, 90-94, 97 (pp. 805-806), 99 through 101; and

Petitioner's Exhibits ("Pet'r's Ex.") 6 (pp. 20, 22, 23 (only and for limited purpose: historical background), 14, 18 (email only), 19, 21 (for limited purpose: it was discussed at 5/19/17 meeting, but not for the truth of the contents), 22, 23, 25 (for limited purpose: showing parent's request for the IEP meeting), 28 (limited to only emails to/from pp. 312-313), 29, 31-33, 36, 37 (p. 392, 394-395), 38 (limited to emails only, pp. 436, 452 (email only) 478-479, 484 limited to email from Ms. 496 limited to 01/18/2017 email from Ms. 40 (p. 521-522, 525-526), 41 (p. 562, 575, 578-579), 43 (limited to emails only, pp. 689-690), 44-48, 57-60, 61 (limited to example to emails only) text), 62 -66, 68-70.

The following exhibits were admitted only pursuant to Petitioner's offer of proof but were not accepted as evidence: Stipulated Exhibits 22, 24, 29 (pp. 135-136), 57.

TRANSCRIPT

Transcript volumes 1 through 9 were received and have been retained in the official record of this case. Transcript volumes 3 and 4 were corrected by the court reporter. The Parties filed a Stipulation on April 1, 2019, stating that they do not object to the amendments made to Transcript volumes 3 and 4, and that in Transcript volume 8 at line 23, the word "combination" is "accommodations".

Transcript volumes 1 through 9 correspond to the following days of hearing:

- a. Transcript volume 1 November 20, 2018
- b. Transcript volume 2 November 26, 2018
- c. Transcript volume 3 November 27, 2018 (revised)
- d. Transcript volume 4 November 28, 2018 (revised)
- e. Transcript volume 5 November 29, 2018
- f. Transcript volume 6 November 30, 2018
- g. Transcript volume 7 December 13, 2018
- h. Transcript volume 8 December 14, 2018
- i. Transcript volume 9 January 4, 2019

ISSUES

- 1. Whether Respondent failed to conduct a full and individualized evaluation of May 17, 2017 and May 17, 2018, and if so, whether any such failure denied an opportunity for a free appropriate public education ("FAPE");
- 2. Whether Respondent failed to provide Petitioners an opportunity to examine records, and if so, whether any such failure denied Petitioners their right to parent participation;
- 3. Whether Respondent failed to ensure Petitioners' attendance at the May 19, 2017 IEP meeting, and if so, whether any such failure denied Petitioners their right to parent participation;
- 4. Whether Respondent inappropriately denied eligibility for special education services on May 19, 2017, and if so, whether any such failure denied a FAPE;
- 5. Whether Respondent predetermined see eligibility without consideration of the information available;
- 6. Whether Respondent failed to develop and offer an appropriate Individualized Education Plan ("IEP") between May 17, 2017 and May 17, 2018, and if so, whether any such failure denied a FAPE;
- 7. If Respondent did deny a FAPE, whether placement reasonably calculated to provide educational benefit for tuition reimbursement; and
- 8. If Respondent did deny a FAPE, whether an award of compensatory education is appropriate.

BACKGROUND

At the start of the hearing in this matter, the parties agreed to Jurisdictional, Party, Legal, and Factual Stipulations in a proposed Pre-Trial Order, which was approved and filed in the Office of Administrative Hearings on September 24, 2018. Stipulations are referenced as "Stip. 1," "Stip.

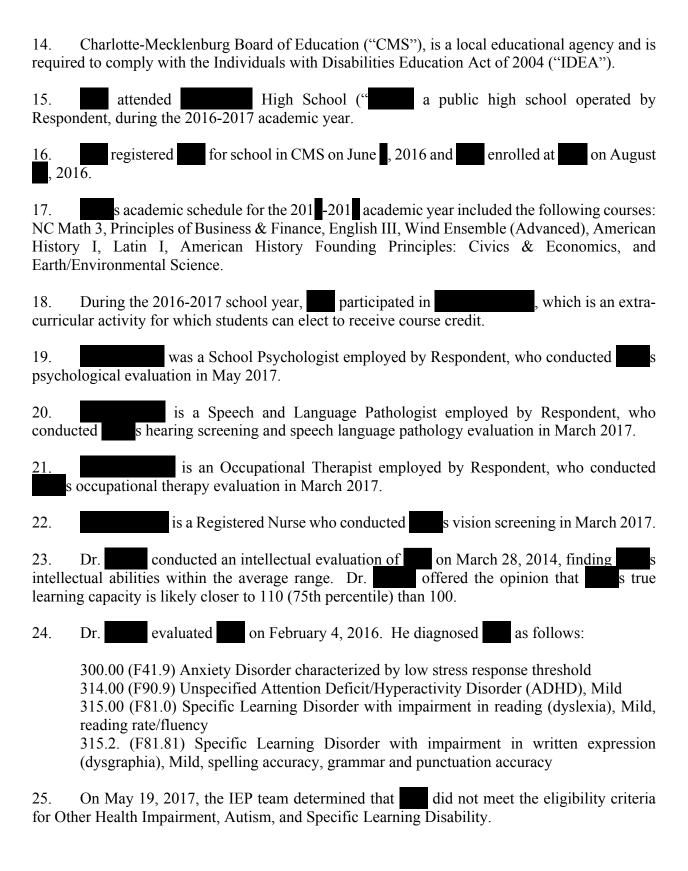
2," "Stip. 3," etc. To the extent that the Stipulations are not specifically stated herein, the Stipulations of Fact in the Order on the Pre-Trial Conference are incorporated fully herein by reference. The parties stipulated to, and the Undersigned hereby adopts, the following:

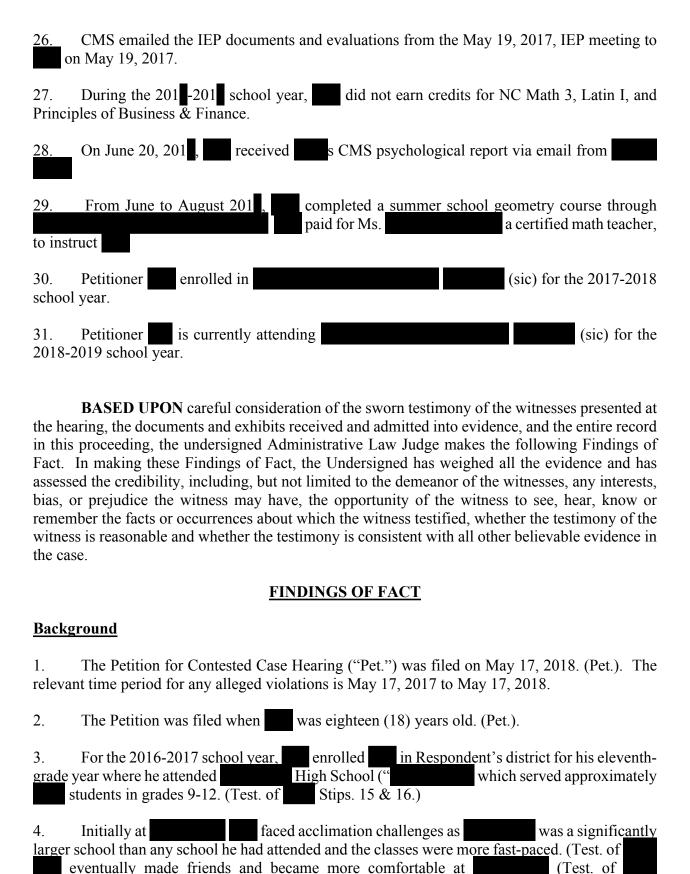
Jurisdiction, Parties and Applicable Law

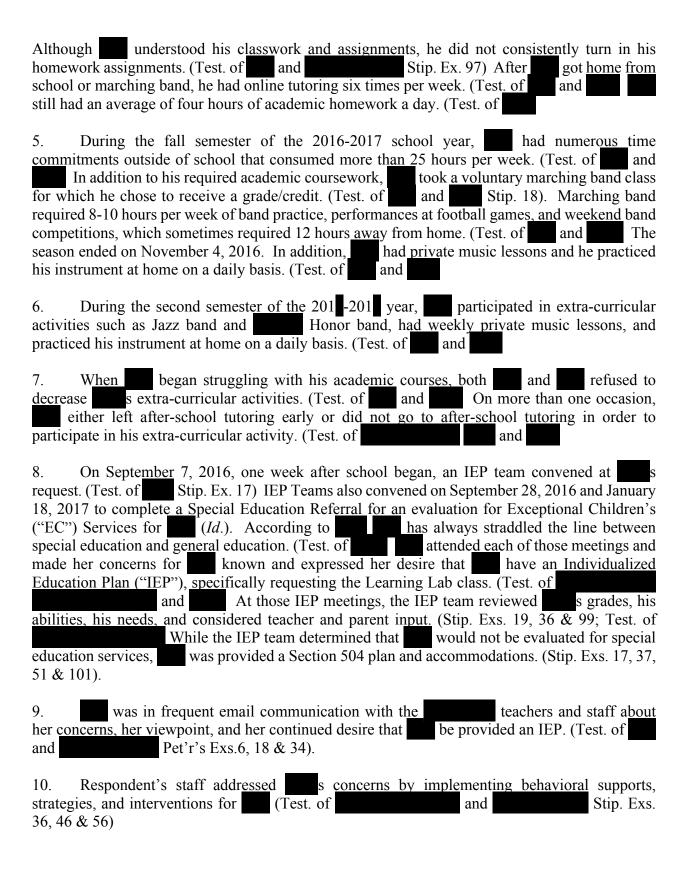
- 1. and Respondent named in this action are properly before this Tribunal, and this Tribunal has personal jurisdiction over them.
- 2. As the party seeking relief, the burden of proof for this action lies with Petitioner. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
- 3. Petitioner has the burden of proof by the preponderance of the evidence. N.C. Gen. Stat. § 150B-34(a).
- 4. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 et seq., and implementing regulations 34 C.F.R. Parts 300 and 301. N.C. Gen. Stat. 115C-109.6(a) and (b) control the issues to be reviewed.
- 5. The IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under the IDEA are codified at 34 C.F.R. Parts 300 and 301.
- 6. Respondent is a local education agency receiving monies pursuant to the IDEA.
- 7. The controlling state law for students with disabilities is N.C. Gen. Stat. Chapter 115C, Article 9 and the corresponding state regulations, including the *Policies Governing Services for Children with Disabilities*.
- 8. Petitioner, as the party requesting the hearing, may not raise issues at the hearing that were not raised in the due process petition.
- 9. Petitioner is seeking compensatory education for his claims.
- 10. Petitioner is seeking private school reimbursement for the 2017-2018 and 2018-2019 academic years in which was enrolled at
- 11. Each of the exhibits identified by the parties as "Stipulated Exhibits" were stipulated as genuine and no objections were to be made to their authenticity.

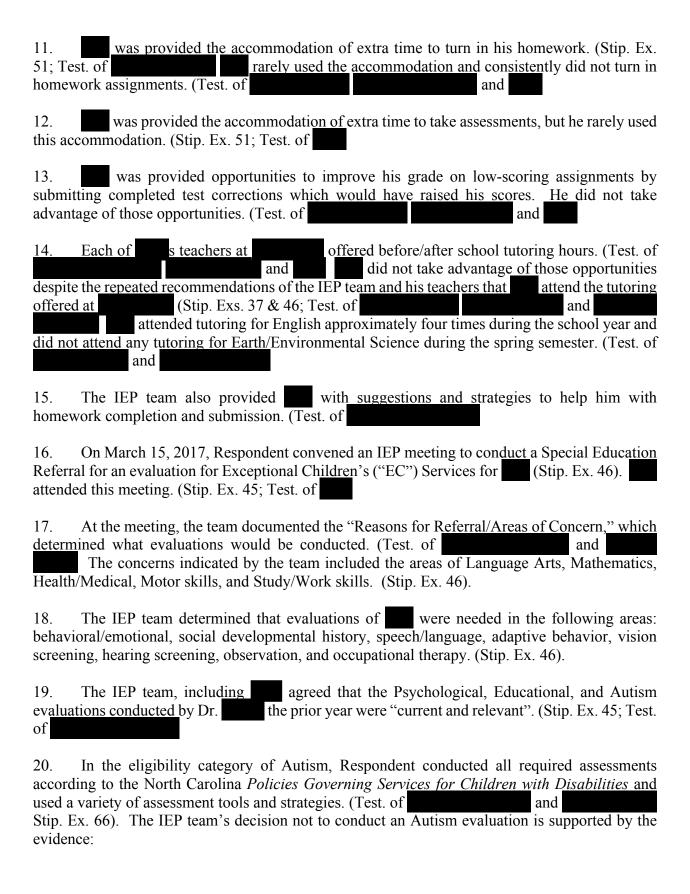
Stipulated Facts

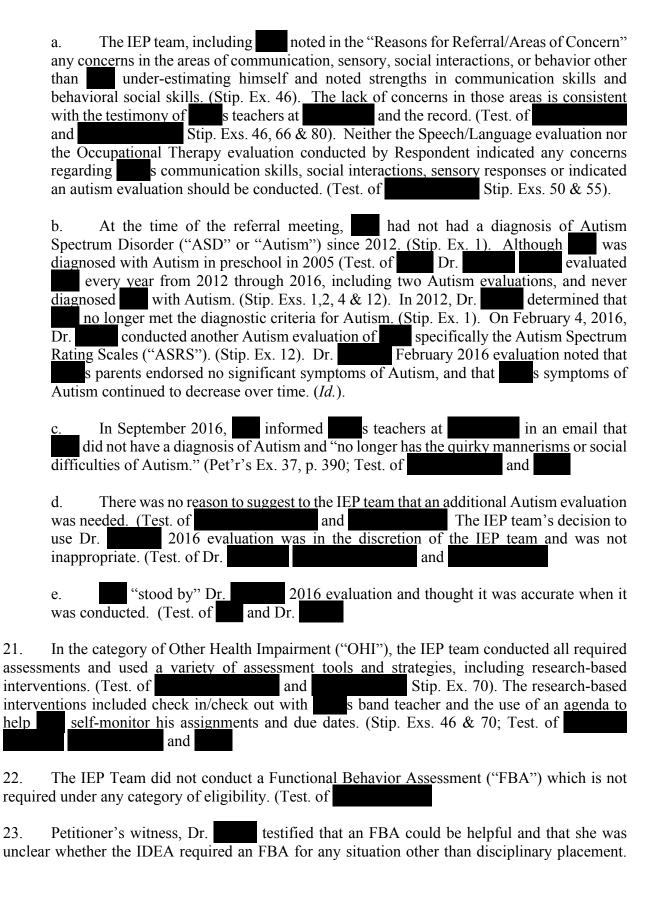
- 12. is an 18-year-old student residing in and their address is [home address is omitted].
- 13. s date of birt

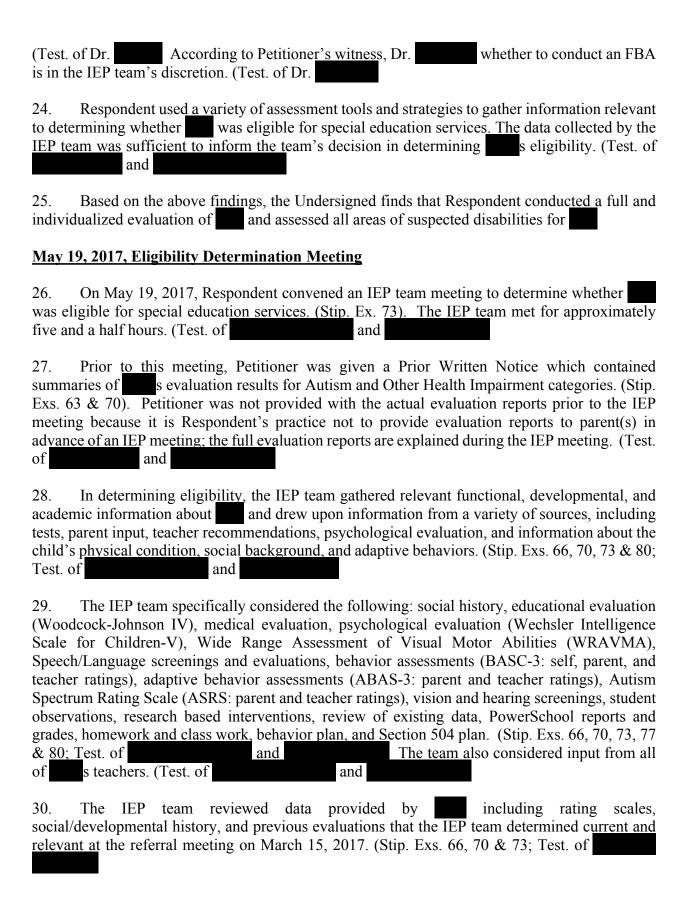


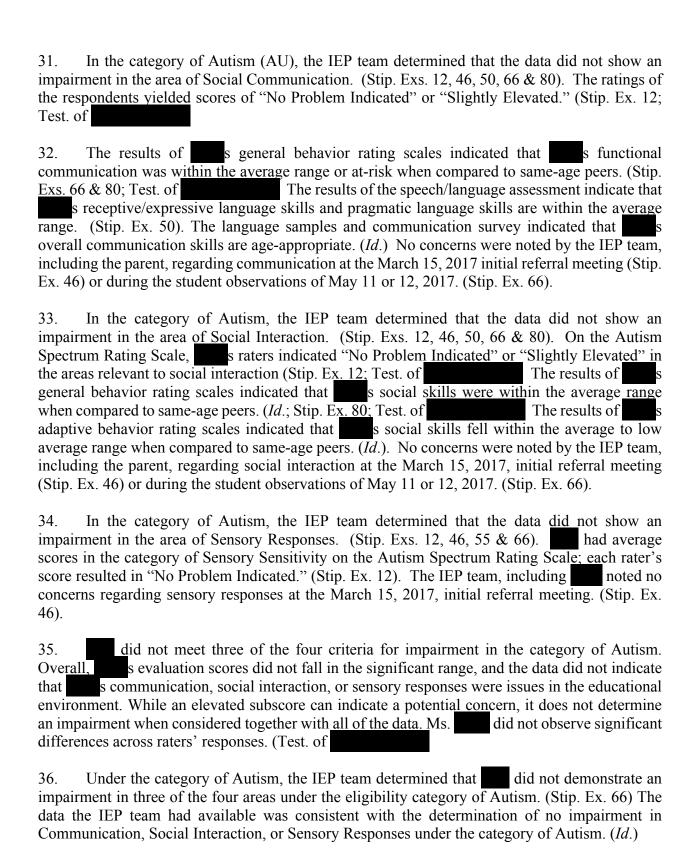


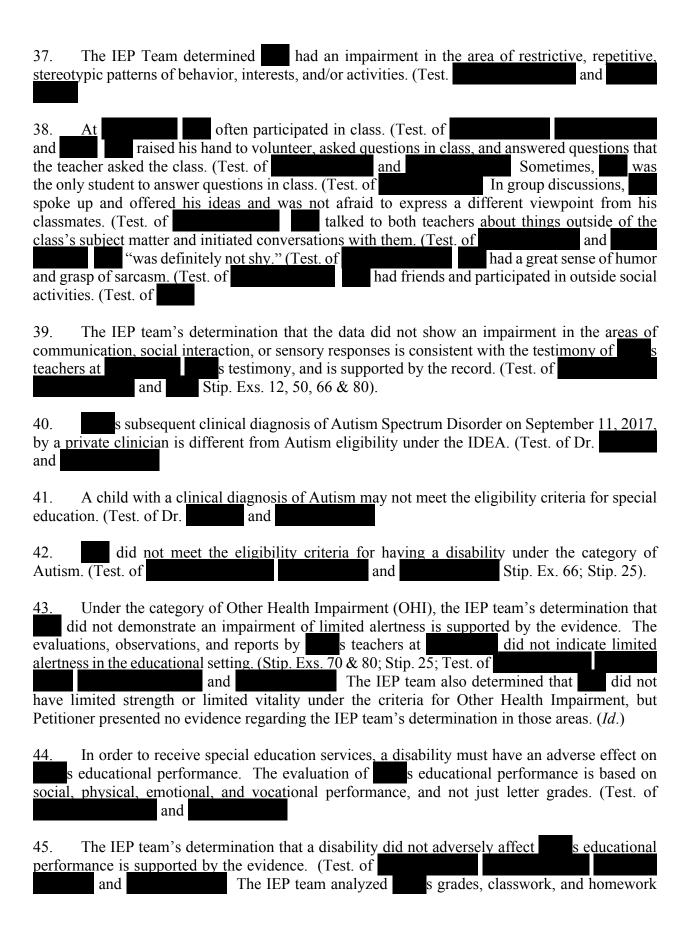


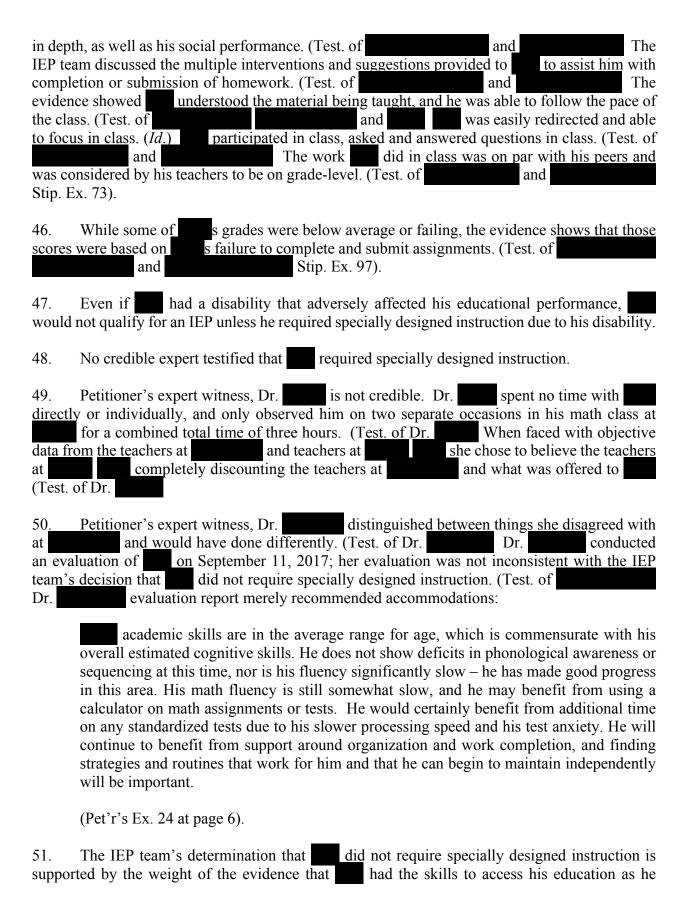


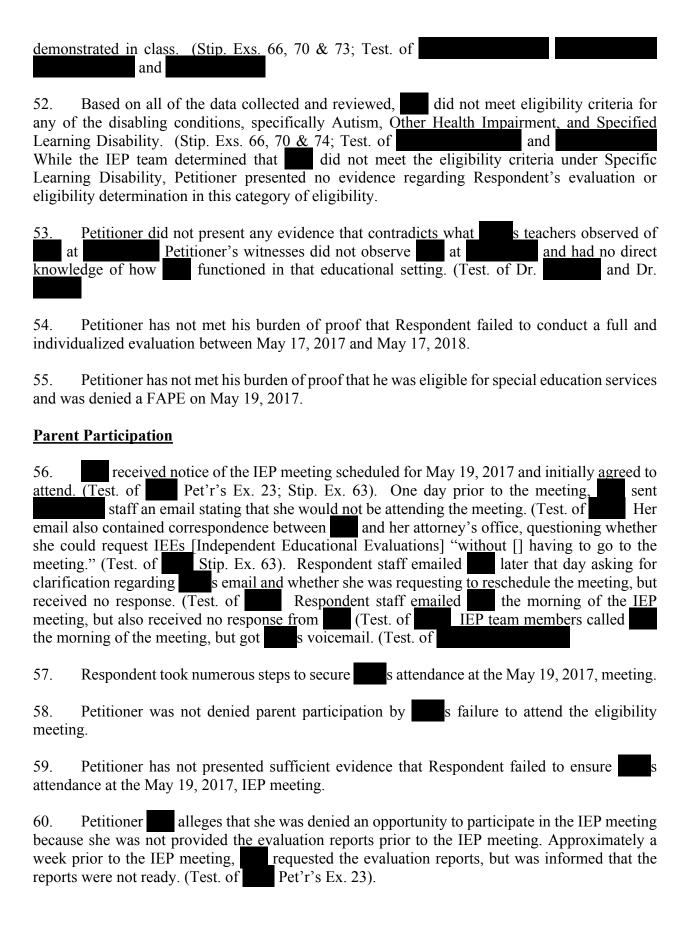


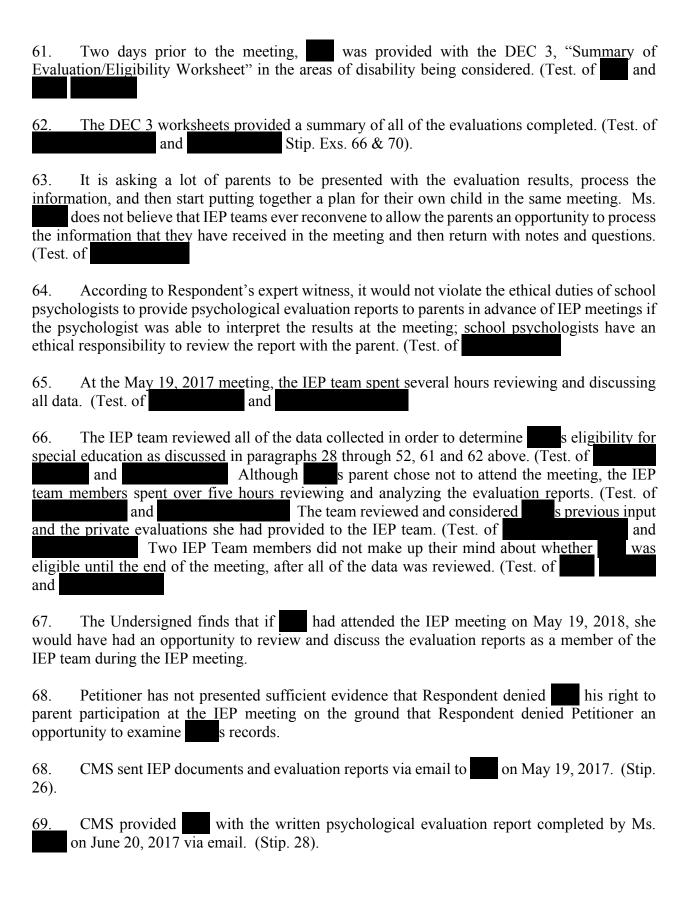








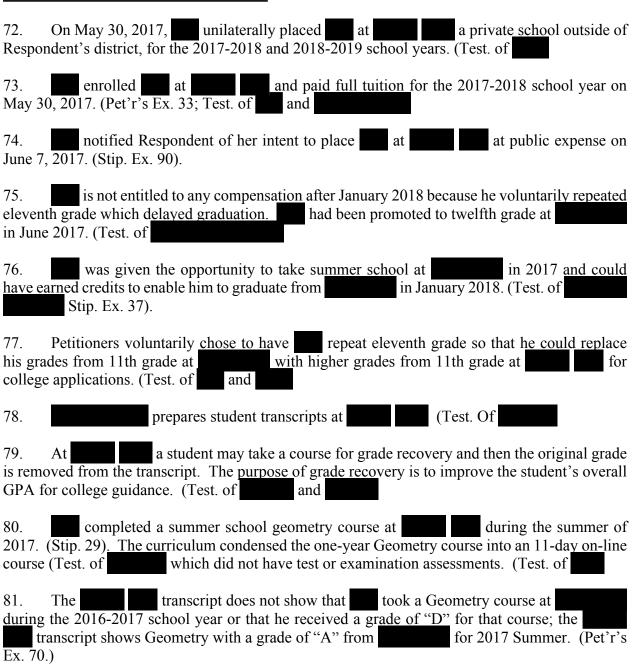


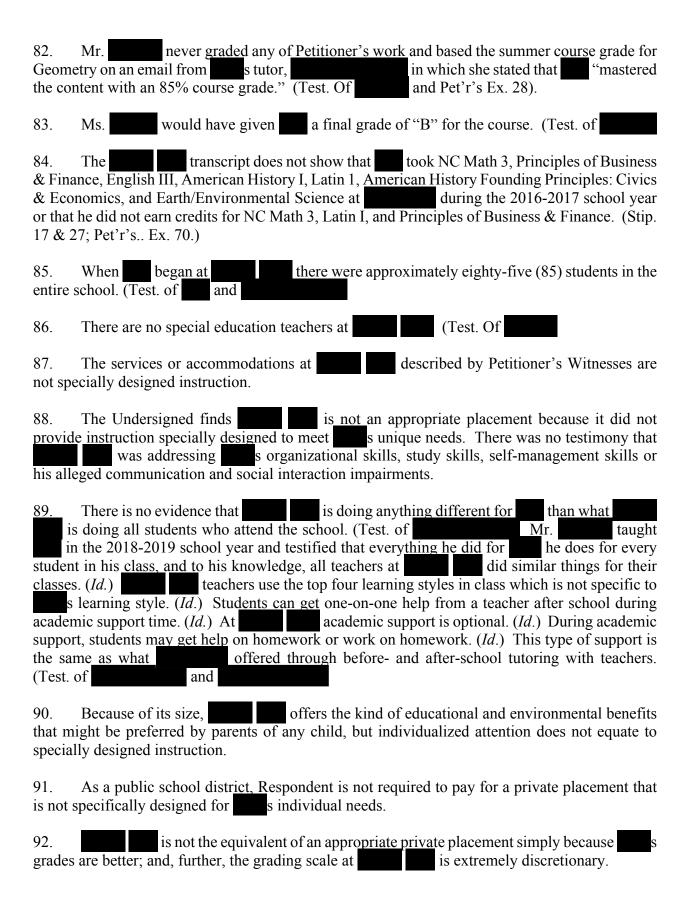


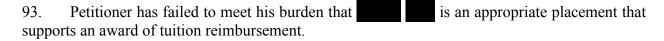
70.	etitioner has not presented sufficient evidence that a decision was made about eligibility
prior to	ne May 19, 2017 IEP meeting.

71.	Petitioner f	failed to	o show	that pr	redetermin	ation	of	s e	eligibility	for	special	educati	ion
service	s occurred p	prior to	the IEP	meeti	ng on May	19, 2	$201\overline{7}$.						

Unilateral Placement in Private School

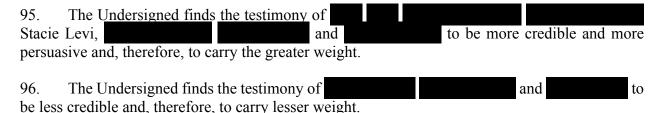






94. Petitioner has not met his burden to show that an award of compensatory education is appropriate.

Witness Credibility



BASED UPON on the foregoing Findings of Fact, the Undersigned makes the following:

CONCLUSIONS OF LAW

- 1. To the extent the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.
- 2. This Order incorporates and reaffirms the Conclusions of Law contained in the previous Orders entered in this litigation.
- 3. The Petitioners and Respondent named in this action are properly before this Tribunal, and this Tribunal has personal jurisdiction over them.
- 4. The Petitioners and Respondent named in this action are correctly designated and have received proper notice of this hearing.
- 5. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §1400 et seq. and implementing regulations, 34 C.F.R. Parts 300 and 301. The IDEA and implementing regulations and N.C. Gen. Stat. § 115C-109.6(a) control the issues to be reviewed.
- 6. In any action brought against a local board of education, the action "shall be presumed to be correct and the burden of proof shall be on the complaining party to show the contrary." N.C. Gen. Stat. § 115C-44(b).
- 7. Petitioner has the burden of proof to demonstrate that the IEPs offered by the school system were not in accordance with federal and state law. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
- 8. The trier of fact has sole judgment of the credibility of witnesses and the weight to be given to the testimony and whether it is consistent with other believable evidence that has been presented

in this case. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citation omitted). ("It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony.")

- 9. To be entitled to the "free appropriate public education" (FAPE) provided by the Individuals with Disabilities Education Act (IDEA), a child must be found to be a "child with a disability," within the meaning of the IDEA, "who, by reason thereof, needs special education and related services." 20 U.S.C. 1401(3)(A); 34 C.F.R. 300.8(a)(1); 34 CFR 300.300.
- 10. A student who is not entitled to a FAPE cannot show a denial of FAPE. An IDEA remedy cannot be granted to an ineligible student, on either substantive or procedural grounds, as both must rest on a determination that FAPE was denied. "[T]he fact that a child may have a qualifying disability does not necessarily make him 'a child with a disability' eligible for special education and related services." *A.P. ex. rel Powers v. Woodstock Bd. of Educ.*, 572 F. Supp. 2d 221, 237 (D. Conn. 2008), *aff'd sub nom A.P. v. Woodstock Bd. of Educ.*, 370 F. App'x 202 (2d Cir. 2010).
- 11. Whether a student with a disability is afforded a "free appropriate public education" pursuant to an IEP is a two-fold inquiry: (1) whether the State has complied with the procedures set forth in the Individuals with Disabilities Education Act ("IDEA"), *Hendrick v. Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-7 (1982); and (2) whether the IEP developed through those procedures is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 999, 1001 (2017). Thus, to prevail, a Petitioner must demonstrate by a preponderance of the evidence that the school district failed under both prongs of the test.
- 12. In matters alleging a procedural violation of the IDEA, the Court may rule that such a procedural violation results in a denial of FAPE in three circumstances: when the procedural deficiency (1) impeded the child's right to FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE; or (3) caused a deprivation of educational benefit. NC 1504-1.14(a)(2).
- 13. The Fourth Circuit Court of Appeals has clarified that "to the extent that the procedural violations did not actually interfere with the provision of a free appropriate education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate education." *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997); *see also Singletary v. Dep't. of Health and Human Servs.*, 502 F.App'x 340, 342, 2013 WL 29098 (4th Cir. 2013) (unpublished) (holding that "a procedural violation will not support a cognizable claim . . . unless the parent can show the procedural violation actually interfered with the child's FAPE").
- 14. Reviewing courts should be reluctant to second-guess the specialized knowledge and experience of educational professionals. *Board of Educ of Hendrick Hudson Central School Dist, Westchester County v. Rowley*, 458 U.S. 176, 206-08 (1982); *Endrew*, 137 S. Ct. at 1001. "[D]eference is based on the application of expertise and the exercise of judgment by school authorities. The [IDEA] vests these officials with responsibility for decisions of critical importance to the life of a disabled child." *Id.* at 1001.

- 15. A court should not substitute its own notions of sound educational policy for that of local school officials. *Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1000-01 (4th Cir. 1997). Therefore, appropriate IEPs should not be disturbed due to a disagreement with the content or methodology, and courts should defer to the educators' decisions. *Rowley*, 458 U.S. at 207-08.
- 16. Before a child can be eligible for special education and related services under the IDEA, state or local education agencies must evaluate the child and determine that he is "disabled" within the meaning of the IDEA. 20 USC 1414(a)-(c). Eligibility under the IDEA requires more than a diagnosis or a finding of a disabling condition. *See, e.g., Fuaquier Cnty. Pub. Schs.*, 20 IDELR 579 (Va. SEA 1993).
- 17. A school district "must conduct a full and individual initial evaluation" before special education services are initially provided to a child. 20 USC 1414(a)(1); 34 CFR 300.301(a). A school district is required to assess a child in all areas of suspected disability including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 20 USC 1414(b)(3)(B); 34 CFR 300.304 (c)(4); NC 1503-2.5(c)(4).
- 18. A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's IEP. 20 USC 1414(b)(2)(A); 34 CFR 300.304(b).
- 19. As part of an initial evaluation, the IEP team must review all existing evaluation data, classroom observations, and information provided by the parent. 34 CFR 300.305; NC 1503-2.6(a). Based on that review and input from the child's parents, the district must identify what additional data, if any, are needed to determine the child's eligibility and educational needs. *Id*.
- 20. As long as the requirements of the IDEA are satisfied, the selection of particular testing or evaluation instruments is left to the discretion of state and local educational agencies. *Letter to Baumtrog*, 39 IDELR 159 (OSEP 2002); and *Letter to Anonymous*, 20 IDELR 542 (OSEP 1993).
- 21. A "functional behavioral assessment" ("FBA") is not a required screening or evaluation to determine eligibility under any category of disability in North Carolina. *See* NC 1503-2.5(d)(1)-(14).
- 22. A "functional behavioral assessment" ("FBA") is a data collection tool used to address a child whose behavior substantially interferes with his ability or the ability of others to learn in the educational environment. While the IEP team must consider the child's need for the use of positive behavioral interventions and supports under 34 CFR 300.324 (a)(2)(i), and an FBA may help the IEP team address behavioral issues, the IDEA does not require the IEP team to conduct an FBA in order to meet this requirement. 71 Fed. Reg. 46,683 (2006); see also W.S. and K.M. v. Nyack Union Free Sch. Dist., 56 IDELR 210 (S.D.N.Y. 2011) (observing that the lack of an FBA does not render an IEP procedurally inadequate; the IDEA requires only that the IEP team consider behavior interventions and strategies).

- 23. The only time a "functional behavioral assessment" is mentioned in the law is in relation to school personnel's authority to remove a child from their educational placement for disciplinary reasons. *See* NC 1504-2.1. In relation to such action, the child must receive a "functional behavioral assessment." NC 1504-2.1(d)(1)(ii); 34 C.F.R. 300.530(d)(1)(ii).
- 24. Respondent conducted a full and individualized evaluation of and, therefore, Respondent did not deny a FAPE.
- 25. In North Carolina, in order to qualify as a "student with a disability": 1) the student must meet the definition of one or more of the fourteen categories of disabilities; 2) the disability must adversely affect educational performance; and 3) the student must require specially designed instruction as a result of his disability. NC 1503-2; see 34 CFR 300.8(a)(1) (emphasis added).
- 26. In interpreting evaluation data for the purpose of determining if a child is a child with a disability under 34 CFR 300.8, and the educational needs of the child, each public agency must: (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and (ii) Ensure that information obtained from all of these sources is documented and carefully considered. 34 CFR 300.306(c)(1).
- 27. Under federal law, "autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." 34 CFR 300.8(c)(1)(i).
- 28. In North Carolina, in order to be determined eligible in the disability category of Autism (AU), "a child must demonstrate at least three of the four characteristics listed below: (A) Impairment in communication; (B) Impairment in social interaction; (C) Unusual response to sensory experiences; (D) Restricted, repetitive, or stereotypic patterns of behavior, interests, and/or activities." NC 1503-2.5(d)(1). In addition, the "disability must: (A) Have an adverse effect on educational performance, and (B) Require specially designed instruction." *Id*.
- 29. In North Carolina, in order to be determined eligible in the disability category of Other Health Impairment (OHI), first "a child must have a chronic or acute health problem resulting in one or more of the following: (A) Limited strength; (B) Limited vitality; (C) Limited alertness, including heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment." NC 1503-2.5(d)(10). In addition, the "disability must: (A) Have an adverse effect on educational performance, and (B) Require specially designed instruction." *Id*.
- 30. "Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability...." NC 1500-2.32(a)(1).

- 31. Specially designed instruction means "adapting, as appropriate, to the needs of an eligible child under these Policies, the content, methodology, or delivery of instruction-- (i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children." NC 1500-2.32(b)(3); see 34 CFR 300.39.
- Respondent did not improperly deny eligibility for special education services on May 19, 2017 and, therefore, Respondent did not deny a FAPE.
- 33. An Individualized Education Plan (IEP) is provided only to students who are eligible for special education. An IEP is a written document that must include a statement of: (1) the child's present levels of academic achievement and functional performance; (2) measurable, annual goals; (3) how progress will be measured and reported; (4) special education and related services and supplementary aids and services; (5) an explanation of the extent, if any, to which the child will participate with nondisabled children in the regular class; (6) any individual appropriate accommodations for State and districtwide assessments; and (7) the projected start date, frequency location, and duration for services and modifications. NC 1503- 4.1(a)(1)-(7).
- 34. "[C]rafting an appropriate program of education requires a prospective judgment by school officials" and requires the "expertise of school officials" and "input of the child's parents...." *Endrew* at 999.
- 35. Because was not eligible for special education services under the IDEA as a child with a disability, Respondent did not deny a FAPE by failing to develop appropriate IEPs.
- 36. A parent's right to participate in an IEP meeting for their child extends to the identification, evaluation, and educational placement of the student. NC 1504-1.2(b)(1)(i). The right also extends to meetings to decide on the provision of a free and appropriate public education. NC 1504-1.2(b)(1)(ii). The school district must take steps to ensure that a parent can participate including early notification and scheduling at agreeable times. NC 1503-4.3(a)(1)-(2). If a parent cannot physically attend, telephonic participation is permissible. NC 1503-4.3(c). This right is not unlimited when the parent resists attending the meeting. NC 1503-4.3(d).
- 37. If a parent refuses to attend an IEP meeting or takes actions that are equivalent to refusing to attend an IEP meeting, the school board may hold the meeting without the parent. 34 CFR 300.322(d); see e.g., A.L. v. Jackson Cnty. Sch. Bd., 635 F. App'x 774, 780 (11th Cir. 2015) (unpublished) (although mother alleged she never explicitly refused to attend the IEP meeting, the court noted that "her actions were tantamount to refusal," and it was appropriate for district to hold the meeting without the parent).
- 38. Respondent did not fail to ensure statement at the May 19, 2017 IEP meeting, and Respondent did not deny Petitioner his right to parent participation.
- 39. Under the law, no right exists for Petitioners to receive evaluation reports prior to an IEP meeting. There are two policies related to this issue in North Carolina's *Policies Governing*

Services for Children with Disabilities: 1503-4.3(f) states that "[t]he LEA must give the parent(s) a copy of the child's IEP at no cost to the parent(s) within a reasonable timeframe following the IEP meeting"; and 1503-2.7(a)states that "[u]pon completion of the administration of assessments and other evaluation measure--...(2) the LEA provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent."

- 41. There is no law, policy or professional ethic that prohibits the provision of a psychological report or any other evaluation report to a parent prior to an IEP meeting in which the appropriate professional will interpret the report's contents.
- 42. Respondent did not deny provide full evaluation reports to prior to the IEP meeting.
- 43. The CMS practice, however, of not giving a psychological evaluation report to a parent prior to an IEP meeting and then giving a professional explanation of the psychological evaluation report without a parent's prior reading of it and expecting a parent to digest both the oral explanation and a reading of the written psychological evaluation report while simultaneously participating in an IEP meeting composed of several general and special education professionals, and the LEA representative who are discussing the abilities and disabilities, behavior and conduct, emotional and psychological makeup, and educational needs of the parent's disabled child as well as their perceptions of parental participation in their child's education, is an expectation of herculean proportions.
- 44. A school system must not finalize its decisions before an IEP meeting is held. *Doyle v. Arlington Cnty. Sch. Bd.*, 806 F. Supp. 1252 (E.D. Va. 1992), *aff'd* 39 F.3d 1176 (4th Cir. 1994). Predetermination occurs when school district members of the IEP team unilaterally decide a student's placement in advance of an IEP meeting. *See, e.g., Hanson v. Smith*, 212 F. Supp. 2d 474, 486 (D. Md. 2002) ("If the school system has already fully made up its mind before the parents ever get involved, it has denied them the opportunity for meaningful input.")
- 45. Respondent did not predetermine selection services before the IEP meeting was held on May 19, 2017.
- 46. A parent who unilaterally enrolls their child in private school without the consent of the public school district does so at their own financial risk, and a public school district is not required to fund private school education when the district has offered the student FAPE. *Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359, 373-74 (U.S. 1985). In addition to proving that there was a denial of FAPE under the IDEA, in order to receive tuition reimbursement for private school, a petitioner must also prove that the private school is appropriate. *Florence Cnty. Sch. Dist. v. Carter*, 510 U.S. 7 (U.S. 1993). This remedy is not required or guaranteed; it is solely in the judge's discretion based on the equities. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009).
- 47. A unilateral private placement is only appropriate if it provides "education instruction specifically designed to meet the unique needs of a disabled child." *See Gagliardo v. Arlington Cent. Sch. Dist*, 489 F.3d 105, 115 (2nd Cir. 2007). "[E]vidence of academic progress at a private school does not itself establish that a private placement offers adequate and appropriate education

there is evidence of success, courts should not disturb a state's denial of IDEA reimbursement where the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not." <i>Gagliardo</i> , 489 F.3d at 115.
48. is not an appropriate placement that supports an award of tuition reimbursement.
49. The Fourth Circuit case cited by Respondent concerning Petitioner's claim for an award of tuition reimbursement is not instructive where the decision of that case was based on the fact that the now adult child Plaintiff sought relief against the school district several years after the applicable statute of limitations had run. <i>Emery v. Roanoke City Sch. Bd.</i> , 432 F.3d 294 (4th Cir. 2005). There is no issue concerning the statute of limitations in the within matter.
50. While compensatory education is not a remedy expressly identified by the IDEA, it can be an appropriate exercise of the court's authority to "grant such relief as the court determines appropriate." 20 U.S.C. 1415 (i)(2)(c)(iii) and 34 CFR 300.516.
51. Under the IDEA, when a child reaches the age of majority, all rights accorded to the parent transfer to the child and notice of this transfer of rights must be provided to both parent and child. 20 U.S.C. § 1415(m); 34 CFR 300.50(a); NC 1504-1.21(a) and 1505-2.16(c).
When attained the age of majority on his 18th birthday, March 24, 2018, all rights of transferred to including the right to compensatory education and notice of this transfer of rights.
53. No issue was raised and no evidence was proffered concerning whether Respondent gave notice of the transfer of rights to upon attainment of majority and, therefore, no conclusion is made concerning whether notice was given.
54. Respondent did not deny a FAPE and, therefore, an award of compensatory education is not appropriate.
BASED UPON the foregoing, the Undersigned makes the following:
<u>DECISION</u>
It is hereby ORDERED, ADJUDGED AND DECREED as follows:
1. The Petitioner has failed to carry his burden of presenting sufficient evidence that Respondent denied a free and appropriate public education between May 17, 2017, and May 17, 2018, by failing to conduct a full and individualized evaluation of

under IDEA." Berger v. Medina City Sch. Dist., 348 F3d 513, 522 (6th Cir. 2003). "[E]ven where

- 2. The Petitioner has failed to carry his burden of presenting sufficient evidence that Respondent failed to provide Petitioners an opportunity to examine seconds which denied Petitioner his right to parent participation.
- 3. The Petitioner has failed to carry his burden of presenting sufficient evidence that Respondent failed to ensure Petitioner's attendance at the May 19, 2017 IEP meeting which denied Petitioner his right to parent participation.
- 4. The Petitioner has failed to carry his burden of presenting sufficient evidence that Respondent inappropriately denied eligibility for special education services on May 19, 2017 and, therefore, Respondent did not deny a FAPE.
- 5. The Petitioner has failed to carry his burden of presenting sufficient evidence that Respondent predetermined seligibility.
- 6. The Petitioner has failed to carry his burden of presenting sufficient evidence that Respondent failed to develop and offer an appropriate Individualized Education Plan ("IEP") between May 17, 2017 and May 17, 2018 and, therefore, Respondent did not deny a FAPE.
- 7. The Petitioner has failed to carry his burden of presenting sufficient evidence that School is an appropriate placement that supports an award of tuition reimbursement.
- 8. The Petitioner has failed to carry his burden of presenting sufficient evidence that an award of compensatory education is appropriate.
- 9. Respondent is the prevailing party on all issues.

Therefore, the relief requested in the within Petition for Contested Case (Special Education) hereby is DENIED.

NOTICE OF APPEAL RIGHTS

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this dismissal.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may **appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review**

Officer shall conduct an impartial review of the findings and decision appealed under this section."

Inquiries regarding the State Board's designee, further notices and/or additional time lines should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required close of the appeal filing period.

IT IS SO ORDERED.

This the 23rd day of April, 2019.

Selina Malherbe

Administrative Law Judge

ia Malhabe

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

Ann M. Paradis Ann Paradis Law, PLLC aparadis@ncgplaw.com Attorney for Petitioner

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Jill Y. Sanchez-Myers Charlotte-Mecklenburg Board of Education jill1.sanchez-myers@cms.k12.nc.us Attorney for Respondent

Teresa Silver King NC Department of Public Instruction due_process@dpi.nc.gov Affiliated Agency

This the 23rd day of April, 2019.

Cierra M. Grier

North Carolina Certified Paralegal Office of Administrative Hearings 6714 Mail Service Center

una Dun

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